IN THE SUPREME COURT OF IOWA

Supreme Court No. 15-1191

SPENCER JAMES LUDMAN,

Plaintiff-Appellee/Cross-Appellant,

v.

DAVENPORT ASSUMPTION HIGH SCHOOL,

Defendant-Appellant/Cross-Appellee.

APPEAL FROM THE IOWA DISTRICT COURT FOR SCOTT COUNTY
THE HONORABLE NANCY S. TABOR

DEFENDANT-APPELLANT/CROSS-APPELLEE'S FINAL REPLY BRIEF

Thomas M. Boes AT0001048
BRADSHAW, FOWLER,
PROCTOR & FAIRGRAVE, P.C.
801 Grand Avenue, Suite 3700
Des Moines, IA 50309-8004
Phone: (515) 243-4191
Fax: (515) 246-5808
boes.thomas@bradshawlaw.com

ATTORNEY FOR DEFENDANT-APPELLANT
DAVENPORT ASSUMPTION HIGH SCHOOL

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes and Rules

Other Authorities

REPLY TO LUDMAN'S FACTUAL ASSERTIONS

Davenport Assumption High School's opening appeal brief included an accurate, fair, and complete recitation of the facts relevant to this appeal. In contrast, Plaintiff Spencer Ludman's responsive brief is replete with misstatements and mischaracterizations of the record.

The key facts relevant to the present case are simple and straightforward. On July 7, 2011, Ludman was a member of the Muscatine High School baseball team and a voluntary participant in a baseball game against Davenport Assumption High School (hereafter "Assumption") hosted at Assumption's baseball field.[1] (App. 274; Tr. 551:24-552:6). Ludman was eighteen-years-old at the time and had already completed his senior academic year and graduated from Muscatine High School. (App. 270, 272, 289; Tr. 534:6-13, 541:304, Tr. 612:3-7). While Ludman's teammate was batting and Ludman was "in the hole," he began to prepare for his upcoming at-bat by gathering his batting gloves and helmet from the helmet rack near the dugout opening closest to home plate. (App. 217, 227, 275, 422, 549-52; Tr. 300:14-303:14; 342:10-17; 553:15-554:5). With two

[1] Ludman was not a student at Assumption High School and, therefore, there was no school/student relationship between Ludman and Assumption.

outs in the inning and after the batter got a second strike, Ludman believed it was unlikely the batter would reach base. (App. 275, 549; Tr. 553:15-554:11). Thus, Ludman removed his helmet, returned it to the helmet rack, and then collected his hat and glove and positioned himself in the dugout opening ***at the opposite end of the dugout***—the opening farthest from home plate. (App. 275, 549; Tr. 553:15-554:11). There was 25.5 feet of protective fence screening the majority of the visitor's dugout from the field of play at Assumption's baseball field and the bench behind the fence included two levels on which players could sit. (App. 229, 233, 237-38, 403-35; Tr. 351:23-352:13, 368:9-17, 383:11-385:13). Yet, Ludman elected to take a position in the dugout opening, outside of the protective fence. ((App. 229, 233, 237-38, 403-35; Tr. 351:23-352:13, 368:9-17, 383:11-385:13). Upon taking this position, Ludman testified he was looking at the pitcher but he failed to watch the pitch to the batter and only looked in that direction "[b]ecause of the sound" of the bat and ball making contact, at which point he "immediately shifted [his] head slightly to see where the ball had gone." (App. 275-76; Tr. 556:13-17, 557:9-13). Unfortunately, Ludman's attempt to locate the ball was too late and the ball struck him before he could get out of the way. (App. 277; Tr. 561:9-17).

At trial, Ludman—and every other witness who was asked—admitted getting hit by a foul ball was an inherent risk of participating in the sport of baseball. (Tr. 365:11-21, 406:2-408:3, 463:7-465:7, 491:16-18, 612:8-24, 678:3-11). The 25.5-foot-long fence in front of the visitor's dugout protected players against this risk and, at trial, Ludman admitted he had previously been warned of the foul ball risk at Assumption and the need for players stay behind the fence for their protection. (App. 292; Tr. 621:17-622:11). When Ludman played on Muscatine High School baseball teams from eighth grade through his sophomore year his coach at the time warned the players to be certain to position themselves behind the protective fence while in the visitor's dugout at Assumption. (App. 292; Tr. 621:17-622:11). Cross-examination of Ludman at trial included the following exchange:

> Q. And when you played for Muscatine your 8th grade or 9th grade or even sophomore year, you had a different coach?
>
> A. Yes, I did.
>
> Q. His name was Matt Rivera?
>
> A. Yes.
>
> Q. And when you played at Assumption before July 7, 2011, Coach Rivera had told you where to stand when you were in Assumption's dugout, hadn't he?
>
> A. Yes, he did.
>
> Q. And he told you if you were gonna be in the dugout, he wanted you behind the fence or on the bench, didn't he?

A. Yes.

Q. And that's because the fence would have provided you protection, right?

A. Right.

Q. And when you were hit, you were not behind those two poles on the fence, were you?

A. No, I was not.

(App. 292; Tr. 621:17-622:11). The instruction Ludman received to stay in a protected location in the Assumption dugout is consistent with the 2011 National Federation of High Schools Rules Book, which notes that risks are inherent to playing baseball and states "each athlete is responsible for exercising caution" in order to promote safety. (App. 453).

In an effort to remove focus from the clear, relevant facts of the case and bend the narrative to his suiting Ludman's Brief engages in misstatements, mischaracterizations, and makes assertions without record support. For example, Ludman's Brief includes the false assertion that Assumption's athletic director Wade King "had seen foul balls hit, and even enter the visitors' dugout at Assumption." (Ludman Brief, p. 25). For this proposition Ludman cites King's testimony at Trial Transcript pages 514:16 to 515:1. The content of King's testimony at trial, and in these very pages of the transcript, was inapposite. King testified:

Q. Prior to July 7 of 2011, did you ever see foul balls be hit towards the direction of visitor's dugout and actually

enter into one of those openings that we've discussed of the visitor's dugout?

A. **I don't believe so**.

(App. 265; Tr. 514:22-515:1) (emphasis added).

Ludman's Brief goes on to disingenuously suggest the evidence was undisputed that literally the only place Ludman could have been within the dugout at the time he was struck was standing in the opening of the dugout. (Ludman Brief, p. 31). The only evidence Ludman cites to support this claim in his Brief is his self-serving testimony that after he gathered his glove and hat, "there was nowhere for me to go." (App. 275; Tr. 554:1-4). However, the evidence at trial was to the contrary. It is undisputed that when Muscatine was batting and nobody was on base, which was the situation at the time Ludman was struck by the foul ball, there would be only fifteen total people in the visitor's dugout. (App. 215; Tr. 293:16-294:6). The dugout included a 25.5-foot-long protective fence and was seven feet deep. (App. 237-38; Tr. 383:11-16, 384:18-385:12). There was a bench in the dugout behind the protective fence with two levels upon which players could sit, and Muscatine's assistant baseball coach testified it was common for players to sit on both levels. (App. 229; 233, 403-35; Tr. 351:23-352:13, 368:9-17). Ludman failed to put on evidence showing the bench was full and there was nowhere to sit prior to the foul ball incident. In addition to

being able to sit on the dugout bench, players could stand directly behind the dugout fence and could freely walk from one end of the dugout to the other. In fact, by Ludman's own admission he moved freely from one end of the dugout to the other shortly before he was struck by the foul ball. The helmet rack was near the dugout entrance closest to home plate and the Muscatine assistant coaches testified this is where players would go to obtain their helmets and bats and would emerge from the dugout to the on-deck circle directly from the dugout opening closest to home plate. (App. 217, 227, 422; Tr. 302:13-303:14, 342:10-17). Ludman's own Brief makes clear that Ludman had gone to the helmet and bat rack in preparation for his potential at-bat before the foul ball incident:

> In the fifth inning, Ludman went to the "south doorway" to emerge "on deck" if Brooks Wagner got a hit. (Trans. 552:20-558:11). ***Ludman had donned his helmet and batting glove*** until there were two outs and teammate Wagner got two strikes against him. When it became unlikely that Ludman would bat this inning, ***Ludman removed his batting helmet and batting glove***. He donned his regular cap in anticipation of retaking the field with his teammates.

(Ludman Brief, p. 35) (emphasis added). Thus, in the moments before being struck by the foul ball, Ludman was "in the hole" and necessarily at the dugout opening closest to home plate in order to obtain his helmet and bat in preparation for going out on-deck by exiting the dugout from the opening

closest to home plate. (App. 217, 227, 422; Tr. 302:13-303:14, 342:10-17; 553:15-23). After determining the batter was likely to make an out, Ludman put away his helmet and batting glove and "donned his regular cap in anticipation of retaking the field with his teammates." (Ludman Brief, p. 35). After doing so, Ludman took a position at the ***opposite end of the dugout*** from where the helmet rack was located—in the dugout opening farthest from home plate—where he was ultimately struck by the foul ball. (App. 275; Tr. 553:15-18).

Thus, the evidence is clear that in the moments prior to Ludman being struck by the foul ball he was able to freely move from one end of the dugout to the other. If the dugout had been so crowded, such that there was no protected position available behind the dugout fence, it would have been impossible for Ludman to freely pass from one end of the dugout to the other. The district court, in ruling on Ludman's Motion for Directed Verdict on the submission of comparative fault to the jury, keenly noted the evidence showed Ludman could have stood behind the protective fence if he had desired:

> There is no evidence that [Ludman] couldn't have stood in front of the bench. There was evidence that the batting—actually, the batting helmets and everything to get ready to bat were at the opposite end of the dugout… .

(App. 347; Tr. 893:25-894:4). Thus, contrary to Ludman's misstatement of the trial record in his appeal brief, there was significant and substantial evidence introduced at trial demonstrating Ludman could have taken a protected position behind the fence. Ludman merely had to stop and stand behind the fence at any point while he walked from one end of the dugout to the other behind the 25.5-foot-long dugout fence.

Ludman's Brief further mischaracterizes the ASTM standards he relies upon to suggest Assumption's dugout deviated from the standard of care. Entered into evidence at trial as Exhibit 31 was ASTM F2000-10, "Standard Guide for Fences for Baseball and Softball Fields," ASTM International, West Conshohocken, PA, 2010. (App. 397-402). ASTM F2000-10 is a guidance document, not a standard, published by ASTM, and it has not been adopted as a governing authority in Iowa. (App. 241; Tr. 397:5-398:8). In his Brief, Ludman cites to and quotes section 6.6.1 of ASTM F2000-10, but misleadingly omits the title and initial part of this section to draw distorted conclusions. In full ASTM F2000-10, section 6.6.1 provides as follows:

> 6.6 *Player Bench Protective Fencing:*
> 6.6.1 *Height* – The top of the fence shall be a minimum of 96 in. (8ft) (2.44 m) above grade measured at the side of the play side fence. For the below-grade dugout the protective fencing should cover the entire opening from ground level to top of dugout roof or overhang.

(App. 399). Review of the entirety of section 6.6.1 reveals it concerns only the ***height*** of the protective fencing in front of the player bench or dugout—"***height***" is, in fact, the explicit title of section 6.6.1. Neither section 6.6.1, nor any other provision in ASTM F2000-10 addresses the mandated length or width of the bench/dugout protective fencing. (App. 397-402). Moreover, nowhere in ASTM F2000-10 is there any requirement (or even a suggestion) that open doorways in dugouts are impermissible under the ASTM guidelines. The fact the ASTM guidelines address only the ***height*** of fencing of the bench/dugout is sensible because a fence that is less than full height (i.e., a waist or chest-high fence) risks giving those in the dugout a false sense of security and provides no completely protected seats. A dugout fence with openings for entry and egress does not risk creating this false sense of security, as one standing in a full opening will immediately recognize the absence of fencing and the potential danger. Here, the Assumption dugout actually conformed to ASTM guidelines because the 25.5-foot-long fence in front of the dugout was a full-height fence. (App. 403-35).

On a final key issue, Ludman's Brief mischaracterizes the evidence of the design and construction of other dugouts at the schools in the Mississippi Athletic Conference. At various points, Ludman's Brief asserts some

dugouts at the other high schools had gated dugout openings to the field of play or otherwise had full fencing. Ludman's assertions concerning other dugouts are demonstrably false. Assumption addresses this issue in substantially more detail *infra* at Brief Point III; however, it is important to point out immediately that the offer of proof evidence submitted by Assumption in the district court conclusively established ***none*** of the dugouts at any of the high school baseball fields in the Mississippi Athletic Conference had gates or L-shaped fences at the dugout openings and ***all of the dugouts had at least one unscreened opening directly to the field of play***. (App. 317-19, 439-52).

Ultimately, Ludman's Brief falsely portrays the hazard faced by Ludman as an immense one that Assumption knowingly and unreasonably subjected him to. The reality is that prior to the incident involving Ludman no one had ever suffered an injury similar to Ludman and no one had ever complained to Assumption about the design and construction of the visitor's dugout at Assumption. Ludman did not complain; Ludman's coaches did not complain; no school athletic director or administrator complained; no umpire complained; no players complained; no parents of players complained. Moreover, since the incident, Assumption has not changed the

dugout configuration and still there have been no complaints made to Assumption about the safety of the visitor's dugout.

REPLY ARGUMENT

I. ASSUMPTION WAS ENTITLED TO DIRECTED VERDICT AND, THEREFORE, THE DISTRICT COURT JUDGMENT MUST BE REVERSED AS A MATTER OF LAW.

A. The Limited Duty Rule is Supported by Strong Public Policy and Must Continue to be Recognized and Applied in Iowa.

In responding to Assumption's argument concerning the limited duty rule, Ludman immediately cites to *Thompson v. Kaczinski*, 774 N.W.2d 829, 834 (Iowa 2009) and goes on to analyze and apply the three factors Iowa courts had previously used to analyze the existence of a duty. Ludman's Brief fails to recognize one of these factors, the foreseeability element of the three-factor test, was abandoned by *Thompson* in favor of Restatement (Third) of Torts. In a subsequent case, the Iowa Supreme Court clarified the *Thompson* holding on this point by stating: "In *Thompson*, we said that foreseeability should not enter into the duty calculus." *McCormick v. Nikkel & Associates, Inc.*, 819 N.W.2d 368, 371 (Iowa 2012).

Key to the present case, the *Thompson* court affirmed existence of a duty "is a matter of law for the court's determination." *Thompson*, 774 N.W.2d at 834. In *Thompson*, based on the provisions of the Restatement

(Third) adopted therein, the court held "[t]he general duty of reasonable care will apply in most cases," such that the trial court "need not refer to duty on a case-by-case basis." *Id.* at 834-35. However, the court recognized there are particular situations where duty must be analyzed by the court and where the court should hold there is no duty owed by the defendant or the duty element is modified as a matter of law. On this point, the Iowa Supreme Court stated:

> In exceptional cases, the general duty to exercise reasonable care can be displaced or modified. An exceptional case is one in which "an articulated countervailing principle or policy warrants denying or limiting liability in a particular class of cases." … Reasons of policy and principle justifying a departure from the general duty to exercise reasonable care do not depend on the foreseeability of harm based on the specific facts of a case.

Id. at 835 (internal citations omitted). In sum, an absence of duty or modification of the general duty of care "may be found if either the relationship between the parties or public considerations warrants such a conclusion." *McCormick*, 819 N.W.2d at 371.

In the present case, Assumption contends the limited duty rule is an articulated countervailing principle or policy that warrants modification of the general duty care. As noted in Assumption's opening brief, the limited duty rule is a long-recognized and well-established doctrine that has been adopted and applied by the Iowa appellate courts in case-after-case over a

period of more than forty years—at least since the decision in *Dudley v. William Penn College*, 219 N.W.2d 484 (Iowa 1974), even if the rule was not given the precise label at the time. The limited duty rule is commonly invoked in cases involving sporting events and effectuates the public policy consideration that "a participant in an athletic event assumes certain risks normally associated with the activity." *Leonard ex rel. Meyer v. Behrens*, 601 N.W.2d 76, 79 (Iowa 1999). The limited duty rule has two implications: "It means [1] the duty of care does not extend to natural risks of the activity, or [2] there is no breach of care when the injury results from a risk inherent to the activity." *Anderson v. Webster City Cmty. Sch. Dist.*, 620 N.W.2d 263, 267 (Iowa 2000). In sports cases, like the case at bar, the limited duty rule modifies the general duty of care and the only duty imposed upon a premises owner such as Assumption is to avoid "increase[ing] or creat[ing] a risk outside the range of risks that flow from participation in the sport." *Feld v. Borkowski*, 790 N.W.2d 72, 87 (Iowa 2010).

The New Mexico Supreme Court's decision in *Edward C. v. City of Albuquerque*, 241 P.3d 1086 (N.M. 2014)[2] is analogous and instructive in

[2] The *Edward* decision was partially overruled by *Rodriguez v. Del Sol Shopping Ctr. Associates, L.P.*, 326 P.3d 465 (N.M. 2014); however, the grounds were limited to elimination of foreseeability of harm as a factor in determining whether a duty exists and the *Rodriguez* decision does not

the present case. The *Edward* court applied the principles set out in Restatement (Third), which have been adopted in Iowa, and held the limited duty rule is a sound countervailing principle or policy to support modification of the general duty of care. In *Edward*, the plaintiffs were attending a minor league baseball game and were seated in a picnic area beyond the outfield wall where there was no protective screening. *Edward*, 241 P.3d at 1088. During pre-game batting practice the plaintiffs' child was struck by a baseball hit over the outfield wall by one of the player, which fractured the child's skull. *Id.* The plaintiffs sued the owner of the premises, among others. *Id.*

Faced with the question of the duty owed by the premises owner to those attending the baseball game, the court noted it applies principles consistent with Restatement (Third) section 7 and observed "duty is a policy question that is answered by reference to legal precedent, statutes, and other principles of law." *Id.* at 1091. In considering whether the limited duty rule was an appropriate policy upon which to modify and limit a defendant's duty, the New Mexico Supreme Court first engaged in a lengthy historical analysis of the limited duty rule. *Id.* at 1092-97. Ultimately, the New

---

disturb the conclusion that the limited duty rule is an appropriate countervailing principle or policy to apply to modify the general duty.

Mexico Supreme Court concluded the "limited-duty rule … is warranted by sound policy considerations" and has the effect of limiting the duty of premises owners to attendees of baseball games. *Id.* at 1088. In reaching this conclusion the court stated it was adopting the majority rule, which, in fact, is aligned with the rule previously adopted and applied by the Iowa Supreme Court. The New Mexico Supreme Court reasoned and held as follows:

> Spectators must exercise ordinary care to protect themselves from the inherent risk of being hit by a projectile that leaves the field of play and ***the owner/occupant must exercise ordinary care not to increase that inherent risk***. … As long as the owner/occupant exercises ordinary care not to increase the inherent risk of being hit by a projectile leaving the field, he or she need not be concerned about adverse social and economic impacts on the citizens of New Mexico. … [T]his approach will bring New Mexico in line with the vast majority of jurisdictions that have considered the issue.

Id. at (emphasis added).

In the present case, based upon the clear facts and policies behind it, the limited duty rule is precisely the type of articulated countervailing principle or policy to justify departure from the general duty rule. Underlying the limited duty rule is a number of sound public policies. The first key policy in support of the limited duty rule—which has been asserted and accepted time and again in Iowa and other jurisdictions—is the well-established and significant public policy that participants in sporting

activities accept the inherent risks of the activity. *See Feld*, 790 N.W.2d at 76-77 ("known risks associated with a contact sport are assumed by participants in the sport"). Stated otherwise, public policy expects that "players in athletic events accept the hazards which normally attend the sport." *Anderson*, 620 N.W.2d at 266. Courts in other jurisdictions have expressed this policy even more clearly, stating the limited duty rule "is based on the sound policy judgment that it is undesirable to hold individuals liable for failing to warn against or protect others from obvious risks." *Craig v. Amateur Softball Ass'n of America*, 951 A.2d 372, 378 (Pa. Super. Ct. 2008). Another description of the public policy is: "Voluntary participants in sporting activities are deemed to have assumed commonly appreciated risks inherent in the activity such that any legally enforceable duty to reduce the risks of the activity is limited to mak[ing] the conditions as safe as they appear to be." *Bukowski v. Clarkson University*, 928 N.Y.S.2d 369, 371 (N.Y. App. Div. 2011); *see also Allen v. Dover Co-Recreational Softball League*, 807 A.2d 1274, 1283 (N.H. 2002) ("We conclude that when [the plaintiff] voluntarily played softball—a reasonable activity that she knew involved obvious risks—the defendants had no duty to protect her against injury caused by those risks."); *Bennett v. Hidden Valley Golf & Ski, Inc.*, 318 F.3d 868, 875 (8th Cir. 2003) ("[A] defendant has no

legal duty to eliminate (or protect a plaintiff against) risks inherent in the sport itself."); *Bowser v. Hershey Baseball Ass'n*, 516 A.2d 61, 64 (Pa. Super. 1986) ("It is beyond cavil that those who position themselves on or near the field of play while a baseball event is in progress are charged with anticipating, as inherent to the sport of baseball, the risk of being struck by a batted ball.").

An additional beneficial public policy furthered by the limited duty rule is the encouragement of the availability of athletic activities to youth and the population at large through stemming a flood of litigation that would otherwise decimate sports availability. *Leonard*, 601 N.W.2d at 80 (noting public policy favors imposition of a limited duty in order to "to preserve vigorous and active participation in contact sports" and to stem "the possible flood of litigation that might result from adopting simple negligence as the standard of care to be utilized in sporting contests"); *Pfenning v. Lineman*, 947 N.E.2d 392, 403 (Ind. 2011) ("strong public policy considerations favor the encouragement of participation in athletic activities and the discouragement of excessive litigation of claims by persons who suffer injuries"); *Schick v. Ferolito*, 767 A.2d 962, 968 (N.J. 2001) ("The policies of promotion of vigorous participation in recreational sports and the avoidance of a flood of litigation over sports accidents are furthered by the

application of the heightened standard of care to all recreational sports."); *Sharon v. City of Newton*, 769 N.E.2d 738, 747 (Mass. 2002) (holding public policy encourages participation in athletics, especially amongst youth).

Premised upon this key public policy goal, courts have repeatedly held the limited duty rule must be upheld and that it applies to non-participant defendants as well as co-participants. *See Kavanagh v. Trustees of Boston Univ.*, 795 N.E.2d 1170 (Mass. 2003) (holding a plaintiff injured while playing a competitive sport must satisfy standard of reckless or intentional conduct to hold a non-participant defendant liable); *Trujillo v. Yeager*, 642 F. Supp. 2d 86, 91 (D. Conn. 2009) (holding a simple negligence standard is improper for cases involving injuries suffered during course of sporting activity and requiring proof of reckless or intentional conduct in order to hold non-participant defendant liable for a plaintiff's injuries). Discarding the limited duty rule and instituting a simple negligence standard as it concerns premises owners and sponsors of athletic contests will create a flood of litigation and rapidly diminish the availability of athletic activities to youth and the population at large. *See Leonard*, 601 N.W.2d at 80.

Without the limited duty rule, premises owners and sponsors of sports activities would be obliged to protect participants from every single risk—

even the inherent risks of sports. If the duty standard that Ludman favors is adopted in this case, every single dugout/bench at every single baseball diamond across the state of Iowa will inevitably need gates in order for the premises owner and activity sponsor to protect themselves from specious lawsuits. Between Little League parks; city parks; county parks; state parks; baseball fields at elementary schools, middle schools, high schools, colleges, and universities; and baseball fields of minor league professional teams, there are thousands of baseball fields and sponsors of baseball leagues and tournaments across the state of Iowa that will feel the adverse implications of abandonment of the limited duty rule.

Premises owners and sponsors of sports will face an avalanche of litigation related to the inherent risks of sports if the limited duty rule is discarded. If the limited duty rule is discarded as to baseball players in the dugout there would no reason to keep the rule in place concerning virtually any injuries on the field of play. Imagine a player is injured crashing into a fence while chasing a ball during the course of a game. While this is an inherent risk of the sport, just as foul balls are an inherent risk, without the limited duty rule a tenable argument exists that is sufficient to create a jury question as to whether the premises owner should be held at fault for failure to pad the fence. Just as Ludman's counsel argued to the jury in the trial

court in the present case argued: "Two gates, and none of this happens" (App. 355; Tr. 928:21-22); so too could an enterprising plaintiff's attorney argue in the case of any fence collision: "One piece of padding, and none of this happens." In short, without affirmance and enforcement of the limited duty rule in this case, attempts to hold premises owners and sponsors of sports activities liable for sports injuries will be boundless. Faced with the risk of litigation or the cost of making modifications to all baseball fields to eliminate any potential risks, it is obvious that in many instances baseball fields will close and league and tournament sponsors will shutter operations.

Baseball is far from the only sport that will be decimated by failure to affirm and enforce the limited duty rule. Just as this Plaintiff is seeking to hold Assumption liable for failure to protect him against the inherent risks of baseball that occurred during a game in which he was voluntarily participating, similar claims could be made by players in numerous other sports. For example, in football an inherent risk of the game all players must accept is that players will collide. However, if the limited duty rule is discarded and a player on the sideline is hurt in a collision with a player who crashed out-of-bounds at the end of a play, the player on the sideline will have a viable claim against the high school hosting the game for failure to protect the players on the sideline—even though the injury was caused by an

inherent risk of the sport. Ultimately, if Ludman prevails in this case and the limited duty rule is discarded, then all schools will be forced to eliminate all similar hazards in all other sports. Under a simple negligence standard of care, the ingredients for a lawsuit against a premises owner or activity sponsor would emerge anytime a participant is injured by an inherent risk of the sport as long as some safeguard that could have potentially been erected by the premises owner or sponsor can be dreamed up. Football, basketball, softball, soccer, volleyball, hockey, wrestling, track and field, and potentially many other sports will never be the same if the limited duty rule is not affirmed and enforced here.

As a final matter of important public policy, this court should recognize that the remedy suggested by Ludman (installation of dugout gates or L-shaped protective fencing) is just as dangerous as the malady sought to be fixed. Installing gates would create a host of additional issues. Gates would be constantly opening and closing throughout the baseball game—between every batter, every substitution, and every inning. If a gate is closed but not appropriately latched a player may unsuspectingly crash through it and injure himself or others nearby. If gates are inadvertently left open they would stick out into the field of play and create a hazard for players chasing foul balls. L-shaped fencing would make this hazard a

permanent problem. In the case of dugouts that are sunk into the ground, like Assumption visitor's dugout, the installation of gates immediately in front of the stairs will create a trip hazard. Gates would also drastically slow the pace of play and coaches on the bench would lose the intimacy of an unobstructed view of the game. Ultimately, the protective measures Ludman argues for will create as much, or more, danger than safety.

B. The Trial Record Reveals Assumption is Entitled to the Protection of the Limited Duty Rule under the Facts of the Case.

If the limited duty rule is properly upheld and applied, it is clear Assumption satisfied its applicable duties in the present case and is entitled to judgment as a matter of law. Pursuant to the limited duty rule sport participants accept the inherent risks of participating in the particular sport. Here, the facts are undisputed that foul balls—including foul balls hit towards or into the dugout—are a known and inherent risk of playing baseball. The duty of the premises owner as it concerns the inherent risks of a sport is to avoid creating or increasing a risk beyond the inherent risks of the sport. *Feld*, 790 N.W.2d at 87. At trial, there was no evidence elicited showing Assumption created or increased the risk of foul balls. To the contrary, Assumption actually went above and beyond its limited duty by installing a full-height protective fence that extended for 25.5 feet in front

the visitor's dugout. The dugout was seven feet deep and included a two-tiered bench upon which players could, and commonly did, sit in protected locations.

No rule or regulation requires Iowa high schools to provide any fence—at all—in front of the dugout and, historically, there is evidence in the decisions of the Iowa Supreme Court that premises owners commonly did ***not*** install any screening in front of the benches/dugouts at baseball fields. *See Dudley*, 219 N.W.2d at 486 (noting the baseball field in question had no protective screen in front of the bench and the evidence was that "[s]ome fields in the conference have protective screens, some not, [and] [i]ndeed, ***more schools Penn plays do not have than do have screening***") (emphasis added).

Assumption did not increase the risk of being hit by foul ball but, in fact, substantially minimized the risk by providing a 25.5-foot-long protective fence in front of the dugout—Assumption cannot be faulted for Ludman's decision not to take shelter behind that fence. Examples of the type of conduct by an owner of baseball field that could be fairly characterized as creating or increasing the risk of harm were cited in *Dudley* and involved conduct like introducing an abnormal obstacle to the field of play—such as installing a flagpole in the field of play or leaving a large rock

protruding from the ground and concealed by grass. *Dudley*, 219 N.W.2d at 486. The present case is obviously distinguishable from the flagpole or rock cases involving introduction of abnormal obstacles to the field of play. Here, foul balls are a natural and known circumstance of the game of baseball. Foul balls occur whether the dugout has no fence, some fence, or complete fencing. Assumption actually ***decreased*** the foul ball risk by installing a full-height 25.5-foot-long fence in front of the dugout and installing a two-tiered bench in the dugout upon which players could take a seat in a protected location. For this reason alone, Assumption's actions cannot be reasonably characterized as creating or increasing the risk of foul balls.

Moreover, even when standing in the dugout opening where he was struck by the foul ball, Ludman was approximately 65 feet away from home plate, and was not so close to the batter that he could not have protected himself from foul balls. (App. 216; Tr. 300:11-13). Ludman was farther away from home plate than the pitcher, who begins his windup at the pitching rubber 60 feet, 6 inches from home plate and who is at least a few feet closer than that to home plate after finishing his stride and delivering the pitch to the batter. (App. 459). If the pitcher—who has the added task of delivering and following through on his pitch—is expected to, and does,

protect himself from batted balls when he is just 57 feet from home plate, even closer to the batter than was Ludman, it is not unreasonable to expect Ludman to similarly protect himself when he chooses to stand outside the protection of the dugout fence to watch the baseball game. The evidence is conclusive and shows Assumption did not create or increase the inherent risk of foul balls that came to pass.

Based on the strong public policy considerations that favor the limited duty rule and the factual record supporting invocation of the rule in the present case, this court must adhere to and enforce the limited duty rule in this case.[3] Therefore, the district court's denial of directed verdict in favor

---

[3] The amicus curiae brief filed by the Iowa Association of Justice in this case makes an argument for application of Restatement (Third) section 40 in the present case and suggests a school/student or invitee relationship should either give rise to heightened duty or preclude application of the limited duty rule. The amicus is wrong in a number of ways. First, this Restatement provision and the underlying argument were never raised in this case below and, thus, error has not been preserved. More importantly, on its very face this Restatement (Third) section 40 can have no application based on the facts and actual relationships at issue in this case. Restatement (Third) section 40 states certain special relationships, including the relationship of "a school with its student" give rise to a duty. Here, there was no school/student relationship between Ludman and Assumption. Ludman was never a student of Assumption High School. He was, at least at one time, a student of Muscatine High School and Ludman did initially name Muscatine High School as a defendant in this case, but ultimately voluntarily dismissed Muscatine High School from the case. (App. 3). To the extent Restatement (Third) section 40 could have any application to this case it was to the claims of Ludman against Muscatine High School, not to his claims against Assumption. At the time of the incident giving rise to this case, Ludman

of Assumption must be reversed and Ludman's claims against Assumption must be dismissed as a matter of law.

C. The Foul Ball Risk was Open and Obvious.

Based upon Restatement (Second) of Torts section 343A, Assumption's opening brief argues the district court erred in failing to direct verdict in favor of Assumption. (*See* Assumption's Opening Brief, pp. 42-46). Ludman's Brief fails to provide any response to Assumption's argument. Assumption stands on its initial briefing and maintains Restatement section 343A, long-ago adopted and frequently applied in Iowa, is applicable and compels reversal and dismissal of Ludman's lawsuit.

II. THE TRIAL EVIDENCE WAS INSUFFICIENT TO GENERATE A JURY QUESTION.

Assumption's opening brief cited a number of key and undisputed facts and closely analogous case law in support of its argument on the insufficiency of the evidence and Assumption stands on its briefing.

---

was eighteen-years-old—an adult—and had already graduated high school. Ludman was undisputedly aware of the foul ball risk in general and was specifically aware of the fact the Assumption dugout was not fully screened—having been warned of this fact by a coach during previous visits to Assumption. This further demonstrates Restatement (Third) section 40 has no application to this case because Ludman's ability to self-protect was not compromised by the premises invitee relationship.

In reply, Assumption is compelled to point out a patent misstatement of the record made in Ludman's Brief. In arguing Assumption should have designed and constructed the dugout differently, Ludman states: "Ironically, three of the 'other' MAC dugouts had the same full protection urged by the plaintiff for the Assumption dugout."[4] (Ludman Brief, p. 54). Ludman's assertion is patently untrue based upon a review of Exhibit C to Assumption's offer of proof, which are photos of the dugouts throughout the Mississippi Athletic Conference, and the offer of proof testimony of Assumption's expert, Greg Gowey, who had visited the baseball fields of all high schools in the conference. (App. 317-19, 439-52; Tr. 733:14-741:5). Review of this evidence proves none of the dugouts of other schools in the conference had gates or L-shaped fencing similar to what Ludman urged Assumption should have installed. Ludman's misstatement of the record is addressed more thoroughly in the next brief point concerning the reversible error of the district court in precluding evidence of other baseball fields at trial.

[4] As an initial matter, Ludman pointing to this evidence to support the sufficiency of the evidence is perplexing because on Ludman's own motion the district court barred Assumption from presenting evidence of other baseball fields at trial; thus, evidence of other dugouts has no bearing on the sufficiency of the evidence to create a jury question.

III. EVIDENCE OF OTHER BASEBALL FIELDS WAS ADMISSIBLE AND ASSUMPTION WAS HIGHLY PREJUDICED BY ITS EXCLUSION.

As is common in negligence lawsuits alleging violation of a standard of care, Assumption sought to introduce evidence of the customary practice of other similarly situated entities as evidence of the standard of ordinary care. In short, Assumption marshaled evidence through photographs and testimony concerning the design and construction of the dugouts at each high school baseball field in the Mississippi Athletic Conference—the athletic conference in which both Assumption and Muscatine were a members. (App. 317-19, 439-52; Tr. 733:14-741:5). Despite well-established authority that allows—even compels—admission of such evidence the district court erroneously granted Ludman's motion in limine and sustained Ludman's trial objection; thus, Assumption was barred from presenting this key evidence to the jury.

Authority supporting Assumption's position on this issue is overwhelming. The long and well-established rule is that: "In determining whether conduct is negligent, the customs of the community, or of others under like circumstances, are factors to be taken into account." *Chown v. USM Corp.*, 297 N.W.2d 218, 222 (Iowa 1980). Explained otherwise in comment *b.* to Restatement (Second) of Torts section 295A: "If the actor

does what others do under like circumstances, there is at least a possible inference that he is conforming to the community standard of reasonable conduct." In the closely analogous case of *Gibson v. Shelby County Fair Association*, 65 N.W.2d 433 (Iowa 1954)—a case arising out of an injury at a motor vehicle race where it was alleged safety fencing was insufficient—the Iowa Supreme Court held the district court erred in excluding evidence demonstrating the manner in which other racetracks constructed safety fencing and, therefore, ***the court reversed and remanded for a new trial due to the error in precluding such evidence***. In response to the numerous legal authorities cited by Assumption, Ludman failed to cite to any contrary legal authority and did not even attempt to distinguish the present case from the closely analogous decision of the Iowa Supreme Court in *Gibson*.

Rather than engage Assumption's argument and authorities with any reasoned argument or contrary authority, Ludman misleadingly argues there were differences between the Assumption dugout and the other dugouts of the conference by misstating the record and ignoring the key, probative point of Assumption's evidence. While it is true that the dugouts at the numerous baseball fields varied in some respects, the dugouts did not vary as it concerned the key issue of this case—***the absence of gates or L-shaped screening fences at the dugout openings***. At trial, Ludman made clear his

theory of the case was: Assumption should have installed gates or should have built an L-shaped fence at the dugout openings. (App. 206, 209, 215, 352, 355; Tr. 260:3-25, 270:10-21, 294:7-21, 914:25-916:12, 928:21-23). In support of this theory, Ludman's counsel stated in opening argument that Ludman suffered injuries "all for want of a ***gate***." (App. 209; Tr. 270:17-21) (emphasis added). As trial proceeded, Ludman's strategy remained focused on this theory, which included eliciting the following testimony from Muscatine's assistant baseball coach:

> Q. Coach Panther, can you think of any reason why someone could not cover either of these doors with a ***gate*** similar to the one we see here like on a spring or a latch?
>
> A. No.
>
> * * *
>
> Q. Have you ever seen a dugout that had and ***L shape or a barrier*** to keep balls from going in?
>
> A. Yeah, I have. I've seen those where they'll have a gate maybe three or four feet out in front of the dugout that goes down so no direct balls can go in and you kind of walk around it, yeah, I've seen those.

(App. 215; Tr. 294:7-21) (emphasis added).

Ludman's counsel continued to emphasize this theory in closing argument by making the following statements:

- "How about ***gating*** it?" (App. 352; Tr. 914:25-915:1).
- "[I]f you don't want to put gates up, then what you do is you ***change the entrance***. Close these and change the entrance to this end of the dugout so that players walk out and go around and come onto the field." (App. 352; Tr. 915:24-916:3).

- "***Two gates***, and none of this happens." (App. 355; Tr. 928:21-22).

Because Ludman's theory of the case depended so heavily on the contention the dugout openings should have been gated or screened, Assumption sought to present photographic evidence and the testimony of an expert witness who had visited all of these baseball fields concerning the design and construction of dugouts throughout the Mississippi Athletic Conference. Assumption presented the evidence through an offer proof after the district court had ruled against the admissibility of such evidence in response to Ludman's motion in limine. (App. 191-92, 317-19, 439-52; Tr. 733:14-741:5). Through Assumption's offer of proof, it was clear that ***none of the dugouts in the conference had gates or L-shaped fencing*** to fully screen the dugouts from the field of play and that many of the dugouts were far less protective than Assumption's because they had only waist-high fencing. (App. 317-19, 439-52; Tr. 733:14-741:5). Nonetheless, following the offer of proof, the district court affirmed its erroneous limine ruling and barred Assumption's evidence from reaching the jury. (App. 191-92, 318-19; Tr. 740:21-741:5).

The error of the district court in failing to admit this evidence is obvious; thus, Ludman's appeal brief attempts to minimize the import of this evidence by mischaracterizing and in some instances patently

misrepresenting it. In his Statement of Facts, Ludman states of the other dugouts in the Mississippi Athletic Conference that "some had full fencing and some did not." (Ludman Brief, p. 34). This statement is simply not true because ***none*** of the dugouts in the conference had full fencing—all had openings directly from the dugouts to the field of play. (App. 317-19, 439-52; Tr. 733:14-742:5). In the argument section of his Brief, Ludman again erroneously represents: (1) Davenport North High School included one dugout "that is fully fenced and completely protected from foul balls"; (2) Pleasant Valley High School's dugouts are "fully fenced to protect players" and "appears to have a gate on the dugout which is the closest to home plate"; and (3) Bettendorf High School's dugouts are "fully fenced." (Ludman Brief, pp. 58-59). These assertions are simply untrue.

The following photographs of the Davenport North dugouts show the dugouts are not fully fenced and both dugouts have an opening at each end of the dugout directly to the field of play, which was also the undisputed testimony of Assumption's expert witness during the offer of proof. (App. 317, 440; Tr. 735:15-736:8).

Address: Davenport North Highschool Basebal field

(Exhibit C; Tr. 735:15-736:8).

Again, directly contrary to the assertions in Ludman's Brief, the following photographs of the Pleasant Valley dugouts show the dugouts are not fully fenced, both dugouts have a single opening at the end of the dugout nearest to home plate directly to the field of play, and there are no gates at the dugout openings, which was also the undisputed testimony of Assumption's expert witness during the offer of proof. (App. 318, 448; Tr. 737:21-738:7). It appears Ludman confuses the gates that open out of the back of the dugout to the spectator area for gates to the field of play.

Address: Pleasant Valley High School Baseball Field

(App. 318, 448; Tr. 737:21-738:7).

Finally, the following photographs of the Bettendorf dugouts show the dugouts are not fully fenced. The visitor's dugout includes a side entrance that restricts foul balls from directly entering that dugout from home plate; however, the side entrance is not gated, opens directly to the field of play, and would not protect against errant throws entering the dugout. (Exhibit C; Tr. 740:5-19). The home dugout has only a waist-high fence with openings directly to the field of play on both ends. (App. 318, 452; Tr. 740:5-19).

Address: Bettendorf High School Baseball Field

(App. 318, 452; Tr. 740:5-19).

Of the twenty dugouts at the baseball fields of the Mississippi Athletic Conference only Bettendorf's visitor's dugout was designed and constructed in a way that it could have prevented the type of foul ball that struck Ludman from entering the dugout but that design creates its own different risks. (App. 317-19, 439-52; Tr. 733:14-742:5). Meanwhile 95% of the twenty dugouts in the Mississippi Athletic Conference are substantively the same: they include direct openings to the field of play with direct exposure to home plate, they do not include gates, and they do not include L-shaped fencing to screen dugout openings. Concerning the fighting issue of whether Assumption violated the standard of care by failing to install gates or L-shaped protective fencing at the dugout openings, the evidence of other dugouts was highly probative and admissible.

Ludman's Brief further takes issue with Assumption's evidence because it does not account for the precise distance the dugouts were from home plate or the angles at which the dugouts were situated. However, the evidence of other dugouts was intended to directly combat Ludman's false theory that the standard of care compelled Assumption to install gates or construct L-shaped protective fencing. The foundation for admitting Assumption's evidence for the purpose of showing this fact was well-

established by the photographs and testimony. Where Ludman was allowed to repeatedly argue the absence gates or full protective fencing was a deviation from the standard of care, Assumption was undoubtedly entitled to put forth evidence of custom and practice of its peers to support its contention that it did not deviate from the accepted standard of care. The existence of differences between the dugouts does not render Assumption's evidence inadmissible, but rather goes to the weight the jury might have ascribed to it. *Bowan v. Express Med. Transporters, Inc.*, 135 S.W.3d 452, 460 (Mo. Ct. App. 2004) ("Even when the evidence will not show a uniform general custom, however, it may be 'admissible as a generally followed practice tending to show the standard of care exercised by ordinarily prudent persons.'"); *Roberts v. Indiana Gas & Water Co.*, 218 N.E.2d 556, 558 (Ind. Ct. App. 1966) ("The degree of widespread usage of such a custom went only to the weight of the evidence not the admissibility.").

Ultimately, the district court's preclusion of the evidence of other dugouts was erroneous and highly prejudicial to Assumption. In the event this court reaches this issue, the judgment must be reversed and the case remanded for a new trial.

IV. THE DISTRICT COURT ERRED IN FAILING TO GIVE JURY INSTRUCTIONS REGARDING "PROPER LOOKOUT."

Ludman's own testimony at trial was that, while he was generally watching the game, he did not watch the pitch delivered to the batter that was then hit in his direction. (App. 275-76; Tr. 556:13-17, 557:9-13). Ludman's own testimony was stated he was looking at the pitcher once he took up his position in the dugout opening, but he failed to watch the pitch to the batter and only looked in that direction "[b]ecause of the sound" of the bat and ball making contact, at which point he "immediately shifted [his] head slightly to see where the ball had gone." (App. 275-76; Tr. 556:13-17, 557:9-13). Thus, there is strong evidentiary support for the argument Ludman did not execute his duty to be careful of his own movements in relation to things seen and that could have been discerned or seen if he had exercised his own duty of care. *See Coker v. Abell–Howe Co.*, 491 N.W.2d 143, 150 (Iowa 1992).

Based on the evidence, this is a classic case in which the jury should have at least been allowed to consider whether Ludman maintained a proper lookout and necessarily supported instructing the jury on the issue of "proper lookout." The failure to instruct the jury on this matter was highly prejudicial to Assumption and requires reversal and remand for a new trial.

RESPONSE TO CROSS-APPEAL

I. LUDMAN WAS NOT ENTITLED TO DIRECTED VERDICT ON THE ISSUE OF COMPARATIVE FAULT.

A. Preservation of Error

Assumption agrees Plaintiff preserved error on this issue.

B. Standard and Scope of Review

Plaintiff frames this issue as one involving directed verdict; however, the reality is the matter involves a dispute as to whether a jury instruction should have been given concerning Ludman's comparative fault. A claim that the district court gave an instruction not supported by the evidence is reviewed for correction of errors at law. *Pavone v. Kirke,* 801 N.W.2d 477, 494 (Iowa 2011). "There must be substantial evidence in the record to support the instruction submitted. Evidence is substantial when a reasonable mind would accept it as adequate to reach a conclusion." *Coker*, 491 N.W.2d at 150. "Instructions must be considered as a whole, and if the jury has not been misled there is no reversible error." *Thavenet v. Davis,* 589 N.W.2d 233, 236 (Iowa 1999).

Alternatively, in the event the appellate court deems the issue concerns whether directed verdict should have been granted, Iowa appellate courts similarly review a district court's ruling on a motion for directed verdict for correction of errors at law. *Pavone*, 801 N.W.2d at 486-87.

Directed verdict is required when there is no substantial evidence to support the claim. *Id.*

C. Discussion

Pursuant to Iowa Code section 668.1, "fault" includes "unreasonable failure to avoid and injury." Assumption requested a jury instruction on this specification of Ludman's fault, and the jury was so instructed in Final Instructions Nos. 13 and 14. (App. 595-96). The jury instructions were proper under *Coker*, which approved of such instructions by stating: "A separate instruction on 'an unreasonable failure to avoid an injury' may be warranted in those cases in which the plaintiff could have acted to avoid injury after the defendant's alleged negligence occurred." *Coker*, 491 N.W.2d at 150

In the present case, the alleged negligence on the part of Assumption was that the design and construction of the visitor's dugout with openings was unreasonable. Assumption contended, even after its alleged negligence, Ludman could have avoided injury by not standing in an open doorway. (App. 356-57; Tr. 940:21-941:16). Thus, the focal question as to whether this specification of comparative fault on the part of Ludman should have been given is whether there was substantial evidence to support it. "Substantial evidence is that which a reasonable person would find adequate

to reach a conclusion." *Hagenow v. Schmidt*, 842 N.W.2d 661, 670 (Iowa 2014). In reviewing whether substantial evidence supports particular jury instructions, the court views "the evidence in the light most favorable to the party advocating submission of the instructions." *Asher v. OB-Gyn Specialists, P.C.*, 846 N.W.2d 492, 495 (Iowa 2014).

Review of the trial record in this case reveals a large volume of evidence indicating Ludman could have taken a position in a protected location and, therefore, avoided injury. Thus, the jury instructions, as given, were supported and Ludman was properly found by the jury to bear a percentage of comparative fault.

At the time Ludman was struck by the foul ball there were only fifteen total people in the visitor's dugout. (App. 215; Tr. 293:16-294:6). A 25.5-foot-long protective fence was installed in front of the majority of the visitor's and the dugout was seven feet deep behind that fence. (App. 237-38; Tr. 383:11-16, 384:18-385:12). The bench constructed at the back of the dugout and behind the protective fence included two levels for players to sit upon, and Muscatine's assistant coach testified the players commonly used both levels of the bench. (App. 229, 233, 403-35; Tr. 351:23-352:13, 368:9-17). Just from this evidence it is clear there was ample room for Ludman to have taken a protected position behind the fence if he had desired. Ludman

could have either found a standing position directly behind the fence or he could have sat on one of the two levels of the dugout bench behind the fence—thereby avoiding injury.

Moreover, Ludman's testimony and the testimony of other witnesses show Ludman was able to move freely from one end of the dugout to the other immediately prior to taking a position in the dugout opening. This is clear proof that Ludman could have taken a position behind the protective fence and avoided injury if he had been interested in doing so. Ludman's own Brief states that shortly before the incident "Ludman donned his helmet and batting glove." (Ludman Brief, p. 35). The helmet and bat rack was at the dugout entrance ***closest to home plate*** and the Muscatine assistant coaches testified this is where players would go to obtain their helmets and bats and players would then emerge to the on-deck circle from this dugout opening ***closest to home plate***. (App. 217, 227, 422; Tr. 302:13-303:14, 342:10-17). However, when Ludman was struck by the foul ball, he was standing in the dugout opening ***farthest from home plate***—i.e., the opposite end of the dugout from where he was shortly before when he was obtaining his helmet to potentially go out on deck. (App. 275; Tr. 553:15-18).

Thus, the trial evidence reveals the following sequence of events:

(1) Ludman was "in the hole" so he went to the helmet and bat rack near the dugout opening ***closest to home plate*** to get ready to potentially go out on deck;

(2) Once the current hitter who was at-bat got two strikes on him, Ludman believed it was unlikely he would bat that inning, so he removed and put away his helmet;

(3) Ludman then grabbed his glove and hat and took a position at the opposite end of the dugout—in the dugout opening ***farthest from home plate***—and shortly after doing so Ludman was struck by a foul ball.

(*See* App. 217, 227, 275, 422; Tr. 302:13-303:14, 342:10-17; 553:15-555:11). The evidence is clear that in the moments prior to Ludman being struck by the foul ball he was able to freely move from one end of the dugout to the other. If the dugout had been so crowded, such that there was no protected position available behind the dugout fence, it would have been impossible for Ludman to freely pass from one end of the dugout to the other. The district court, in ruling on Ludman's Motion for Directed Verdict on the submission of comparative fault to the jury keenly observed there was substantial evidence Ludman could have stood behind the protective fence if he had desired, stating:

> There is no evidence that [Ludman] couldn't have stood in front of the bench. There was evidence that the batting—actually, the batting helmets and everything to get ready to bat were at the ***opposite end of the dugout***… .

(App. 347; Tr. 893:25-894:4) (emphasis added). Contrary to Ludman's argument on appeal, there was significant and substantial evidence introduced at trial demonstrating Ludman could have taken protected position behind the dugout fence and avoided injury. Ludman merely had to stop and stand behind the fence at any point while he walked from one end of the dugout to the other behind the 25.5-foot-long dugout fence. Therefore, the jury instruction on avoidance of injury was properly given and the jury was properly allowed to determine whether Ludman was at least partially at fault. Ludman's motion for directed verdict on this issue was properly denied and this court should dismiss the cross-appeal.

CONCLUSION

Assumption requests reversal of the district court's judgment and dismissal of Plaintiff's Petition as a matter of law. In the alternative, Assumption requests reversal and remand for new trial due to the evidentiary errors made by the district court. Further, Assumption requests denial and dismissal of Plaintiff's cross-appeal.

REQUEST FOR ORAL ARGUMENT

Assumption hereby requests to be heard in oral argument on both its appeal and Ludman's cross-appeal.

BRADSHAW, FOWLER, PROCTOR &
FAIRGRAVE, P.C.

By: 

Thomas M. Boes AT0001048
801 Grand Avenue, Suite 3700
Des Moines, IA 50309-8004
Tel: (515) 243-4191
Fax: (515) 246-5808
E-Mail: boes.thomas@bradshawlaw.com

ATTORNEY FOR DEFENDANT-
APPELLANT/CROSS-APPELLEE
DAVENPORT ASSUMPTION HIGH SCHOOL

CERTIFICATE OF COSTS

The undersigned hereby certify that the actual cost of reproducing the necessary copies of this document was $ N/A (e-filed), exclusive of sales tax, delivery, and postage.

By: _____

CERTIFICATE OF COMPLIANCE

This Brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) because this brief contains 9,604 words, excluding the parts of the Brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

This Brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because this Brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point, Times New Roman.

By: _____

CERTIFICATE OF FILING AND SERVICE

The undersigned certifies a copy of Defendant-Appellant's Final Brief was filed with the Clerk of the Iowa Supreme Court via EDMS and served upon the following persons by EDMS on the 1st day of April, 2016.

By: _____

Steven Crowley
CROWLEY, BUNGER, SCHROEDER & PRILL
3012 Division Street
Burlington, IA 52601
scrowley@cbs-lawyers.com